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Roger Clark, A Personal Tribute

by William Schabas

Roger Clark has described his participation in the Nuclear Weapons Case at the International Court of Justice as a highlight of his career. He is listed in the report of the Advisory Opinion as one of the representatives of Samoa, along with Laurence Boisson de Chazournes and the head of delegation, Ambassador Neroni Slade. Roger had been active in the area since the very beginning of his scholarly career. He published a short article in 1964 exploring legal strategies for preventing French nuclear tests then planned for the Pacific.¹ When the advisory opinion of the International Court of Justice was published, in 1996, Roger and Madeleine Sann of Rutgers University published the materials developed for the proceedings by Samoa and other Pacific Island States in *The Case Against the Bomb*. He also spoke frequently about the case at conferences.

I recall one occasion, at the International Law Weekend that is held in New York every autumn, where Roger began by distributing a photocopied map of the Pacific Ocean. He identified several locations on the map - Hiroshima, Nagasaki, Bikini Atoll, Moruroa, Kiribati, and others – where nuclear weapons had been used, as well as Auckland, in his native New Zealand, where French agents sank the *Rainbow Warrior* as it prepared to interrupt a nuclear test in the Pacific. He was confronting our Atlanto-centric vision of the world of most of his audience with a vision from the other side of the planet. There, he explained, nuclear weapons were real, not virtual. Roger reminded the audience of the participation of the mayors of Hiroshima and Nagasaki at the hearing in The Hague on the request for an advisory opinion. Fundamentally optimistic in his perspective, Roger was not disappointed by the advisory opinion, although he was well aware of its mixed message and its latent ambiguities. Two decades later, he is back in The Hague as a member of the team representing the Marshall Islands in its applications against the nuclear powers

¹ Roger S. Clark, 'French Tests and International Law', (1964) 52 *New Zealand Monthly Review* 5. See also his memoir on anti-nuclear activities: Roger S. Clark, 'Is the *Butter Battle Book*'s Bitsy Big Boy Boomeroo Banned? What has International Law to Say About Weapons of Mass Destruction?', (2013-14) 58 *New York Law School Law Review* 655, at pp. 659-65.

alleging that they have failed to bargain in good faith in order to rid the world of nuclear weapons.²

During a long conversation held in the summer of 2014 in north London, I asked Roger if he was a pacifist. He shrugged, managing ‘no, not really’ in a Kiwi accent that must be as strong today as when he left his native New Zealand nearly half a century ago. It seemed an equivocal answer from a scholar *engagé*, someone who has spent much of his life bringing legal expertise to bear on problems of peace, aggression and militarism yet unwilling to rule out the use of armed force in certain circumstances. Speaking of his days as a student in New Zealand, in the 1960s, he explained his involvement in the great causes of the day, United States involvement in Viet Nam and South African apartheid. Probably the energy and commitment of that work has never left him.

In the interview, he told me that his interest in human rights was sparked by reading Alan Paton’s classic on race in South Africa, *Cry the Beloved Country* in an English class (‘beautiful, poetic, prose’). Many years later, Bert Lockwood, Editor-in-Chief of *Human Rights Quarterly*, persuaded him to review it for an issue devoted to books that most influenced the authors.³ Roger later met Paton in the 1970s at a function in New York organised by the International League for Human Rights. An anti-apartheid advocate who financed a lifetime of activism on the royalties from the book, Paton passed away in the late 1980s.

Roger Stenson Clark was born in 1940, in Wanganui, New Zealand, then a city of about 30,000, the fifth largest in New Zealand. Wanganui is located on the south-western coast of the North Island, about 200 kilometres from the capital, Wellington. He thrived at school and finished at the top of his class. He was also – and still is – a pretty good runner. He was cross-country champion in his final year at high school. An aptitude test suggested that he should become either a minister of religion or a lawyer. He knew some ministers and was sure that was not a career for

² *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Application instituting proceedings against the Republic of India, 24 April 2014; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, Application instituting proceedings against the Islamic Republic of Pakistan, 24 April 2014; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Application instituting proceedings against the United Kingdom of Great Britain and Northern Ireland, 24 April 2014.

³ Roger S. Clark, ‘Book review of Alan Paton, *Cry the Beloved Country*’, (1992) 14 *Human Rights Quarterly* 653.

him. He did not know any lawyers but decided to move to the capital and enter Victoria University of Wellington in a joint history and law programme. Roger was the first person in his family to go to university.

Law was (and still is) an undergraduate programme in New Zealand. It is now very common for New Zealand students to do joint degree programmes, but Roger was the only one in his law school class to complete one. He spent three years as a full-time student while completing the arts requirements and most of the basic law subjects. He then, as was common in New Zealand at the time, went part-time for the other three years that it took to complete the programme. He spent the three years working in government, the first two in the New Zealand Justice Department and the final year in what was then known as the 'Department of External Affairs' (later renamed the Ministry of Foreign Affairs). The work at External Affairs included involvement in two areas that were to influence his later career significantly, human rights and extradition.

In his final year of law studies, Roger became a Vice-President of the New Zealand University Students' Association, a body representative of the students in the six New Zealand Universities. He also joined the Board of the New Zealand Council for Civil Liberties. He was one of the founders (and first President) of the New Zealand chapter of a fledgling human rights organisation called Amnesty International. New Zealand was being drawn deeper into the Vietnam War and Roger was an active opponent of that involvement. He told me that while he found the work at External Affairs enormously engaging, he felt privileged to be out of government service so that he did not have to defend the Government's Vietnam policy, and on the contrary, could oppose it.⁴ As an academic he felt it an obligation to address the issues of policy, and especially of international law, that were raised by that conflict.

In law school, he again finished at the top of his class and was invited to join the teaching faculty at Victoria as a junior lecturer, beginning in January 1964. The idea was that he would do an LL.M, teach a few years, and then go overseas for graduate study. His teaching commitments were in the areas of legal process, constitutional and administrative law and some criminal law. While at University, he fell under the spell of Colin Aikman, a professor of jurisprudence and constitutional

⁴ His second publication was the text of an address he gave at Teach-Ins on the Vietnam War at Victoria University and the University of Auckland: Roger S. Clark, 'The Geneva Accords and the Two Vietnams', in M. Bassett ed., *New Zealand and South East Asia*, Auckland, 1965.

law at Victoria University as well one of the country's most distinguished public servants. While a junior diplomat in 1948, Aikman had participated actively in the drafting of the Universal Declaration of Human Rights and had the honour of addressing the General Assembly when it was adopted on 10 December.⁵

Roger Clark received his LL.M from Victoria University in 1967. His thesis was on defences to offences of strict liability in criminal law. It was supervised by Ian Campbell of whom Roger said he 'communicated a joy for teaching and was the first to encourage me to one day be a teacher of the law'.⁶ According to plan, he headed off to Columbia Law School in New York in September of that year, encouraged by the great Walter Gellhorn. There he completed a second LL.M as well as a JSD. During the summer of 1968 he interned in the Human Rights Division of the United Nations, then located in New York.

Roger returned to teach at Victoria in 1969 and resumed his anti-war and civil liberties activities. He had a small ('and entirely unprofitable', he says) practice as a barrister, mostly representing demonstrators arrested in protests against the Vietnam War or New Zealand sport contacts (primarily rugby) with *apartheid*-era South Africa. Early in 1971 a surprise telephone call from Geoffrey Palmer, who was then teaching at the University of Iowa, led to his return to the United States on a one-year contract. There he taught human rights, a subject that had yet to become the mainstay of legal education that it is today.

The plan was to return to Wellington after the year in Iowa. But two friends from the Columbia period who had joined the Rutgers faculty, Tom Farer and Hunter Taylor, persuaded him otherwise. He joined the Rutgers University faculty on a three-year contract in 1972 and never left. He is now Board of Governors Professor at Rutgers, the University's highest rank. From the beginning of his tenure at Rutgers, he taught international human rights law and criminal law. In the early 1980s Roger added a course on international criminal law to his repertoire.

Roger Clark's doctoral dissertation, *A United Nations High Commissioner for Human Rights*, was published by Martinus Nijhoff in 1972. The book solidified his position as a serious scholar in the area of human rights. It was one of the early works to offer concrete proposals for strengthening in a structural way the burgeoning

⁵ UN Doc. A/PV.181.

⁶ Roger S. Clark, 'Steven Spielberg's Amistad and Other Things I Have Thought about in the Past Forty Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery', (1998-99) 30 *Rutgers Law Journal* 371, at p. 372, fn. 2.

United Nations Human Rights Programme. The idea was for a high level official who would be a major catalyst for an ambitious international system. He was ahead of his time. Two decades passed before the UN General Assembly created the Office of High Commissioner. Roger's subsequent work on human rights included studies on religious freedom⁷ and on the role of non-governmental organizations in the protection of human rights.

While studying at Columbia, he had formed a relationship with the New York-based International League for Human Rights, one of the first human rights NGOs in the United States.⁸ Roger worked with the League in an effort to make the nascent United Nations human rights procedures work effectively. The system was very much in its infancy, confined essentially to the '1503 procedure' and those of the Human Rights Committee, namely periodic reporting and individual petitions. He was also very active on behalf of the League at the United Nations in decolonisation matters – East Timor, Namibia, the Trust Territory of the Pacific Islands and the French Territories in the Pacific.⁹ He intervened regularly in sessions of the Trusteeship Council, the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples ('the Committee of 24') and the Fourth Committee of the General Assembly.¹⁰

Important scholarly contributions accompanied this activity. He wrote several major articles dealing with efforts towards decolonisation in the Trust Territory of the Pacific Islands¹¹ and in South West Africa/Namibia.¹² His 1980 article on East Timor,¹³ also translated into Bahasa Indonesia as a monograph) was widely regarded as making the seminal legal case for East Timor's independence. With respect to East Timor, Roger participated regularly in public presentations, academic seminars and debates. He often shared a platform with Jose Ramos Horta, a former student of his

⁷ Roger S. Clark, 'The United Nations and Religious Freedom', (1978-79) 11 *New York University Journal of Law and Policy* 197 (1978-1979)

⁸ On the League, see: Jan Eckel, 'The International League for the Rights of Man, Amnesty International, and the Changing Fate of Human Rights Activism from the 1940s through the 1970s', (2013) 4 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 183.

⁹ Much of that involvement is reflected in his scholarly writings.

¹⁰ For example, UN Doc. A/C.4/35/SR.9.

¹¹ Roger S. Clark, 'Self-Determination and Free Association-Should the United Nations Terminate the Pacific Islands Trust?', (1980) 21 *Harvard International Law Journal* 1.

¹² Roger S. Clark, 'The International League for Human Rights and South-West Africa 1947-1957: The Human Rights NGO as Catalyst in the International Legal Process', (1981) 3 *Human Rights Quarterly* 101.

¹³ Roger S. Clark, 'Decolonization of East Timor and the United Nations Norms on Self-Determination and Aggression', (1980-81) 7 *Yale Journal of World Public Order* 2.

who went on to win the Nobel Peace Prize in 1996. Roger was Horta's houseguest for the Timorese independence celebrations in 2002. His daughter Ashley is currently serving as an adviser to the Minister of Youth and Sport in an independent Timor-Leste.

In the early 1980s, New Zealand considered nominating him for a seat on the Human Rights Committee but dropped the idea when it judged that it could not muster the votes. Instead, in 1985, Geoffrey Palmer, who was by then Deputy Prime Minister of New Zealand,¹⁴ arranged for New Zealand to support Roger's candidacy for election to the United Nations Committee on Crime Prevention and Control. This was an expert group that supervised United Nations work on criminal justice issues at its office in Vienna. The election in the Economic and Social Council was a hard-fought affair. The seat on the Committee that was in contention was one to the West European and Other Group (WEOG). There were two other WEOG candidates, from Austria and Canada.

Even in the best of times, New Zealand has trouble competing with other WEOG members for positions on international bodies. But on this occasion, there was an added level of complexity. New Zealand was in deep strife with the United States (and to a lesser extent the United Kingdom) over its policy of not allowing port visits by nuclear-armed or nuclear-powered vessels. Roger had himself offended the Americans by complaining at the Trusteeship Council about their stewardship in the Trust Territory of the Pacific Islands, where they had detonated 67 nuclear weapons. For good measure, two French government terrorists who had been involved in blowing up the Greenpeace anti-nuclear vessel *Rainbow Warrior* in Auckland harbour were in a New Zealand jail. *The Warrior*, after moving a number of Marshall Islanders from their radiation-contaminated atoll, had been on its way to try to interfere with the French nuclear tests at Mururoa. In sum, there were few European votes available.

¹⁴ Palmer, who Roger credits with 'provoking' what turned out to be a permanent move to the United States, also commissioned Roger in the late 1980s to do a 'peer review' of an (unsuccessful) attempt to revise the New Zealand Crimes Act of 1961. The Act is still substantially based on work done for England by Sir James Fitzjames Stephen (the conservative protagonist of John Stuart Mill) in 1879 (and not adopted there). See his satirical account of this effort: Roger S. Clark, 'Criminal Code Reform in New Zealand? A Martian's view of the Erewhon Crimes Act 1961 with some footnotes to the 1989 Bill', (1991) 21 *Victoria University of Wellington Law Review* 1.

Fortunately Jose Ramos Horta, the independence representative from East Timor, was able to line up some votes from Portuguese-speaking countries. Papua New Guinea, which chaired the Committee of 24 and was appreciative of his anti-colonial work, campaigned hard among the Non-Aligned States. Its efforts nearly came unstuck when the members of the New Zealand rugby team (as ‘individuals’) turned up in South Africa at just the wrong moment, an official tour having been enjoined in the High Court. Papua New Guinea was able to explain that Roger was on the other side of that issue. He was ultimately elected on the third round of voting.

Elected to a four-year term on the Committee, Roger was one of a small group that worked hard to raise the visibility of the programme and to obtain more resources for it. For better or for worse, the result of their efforts was the replacement of the expert Committee by a Commission composed of governmental representatives. More resources were obtained, even at the price of the life of the Committee. Roger had also worked as a consultant to the United Nations Secretariat in the drafting of what became the General Assembly’s 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.¹⁵ The Declaration was part of a worldwide effort to make sure that victims are treated with dignity in the criminal process and are not victimised a second time by the ways in which the criminal justice system deals with them. All of this is described in his 1994 book, *The United Nations Crime Prevention and Criminal Justice Program: Formulation of Standards and Efforts at their Implementation*. It is the definitive study of the very significant criminal justice work done by the UN in the first fifty years of the organization’s existence.¹⁶

During the mid-1980s, Roger was active in the creation of the International Society for the Reform of Criminal Law. It brings together academics, practising lawyers and judges, largely but not exclusively from common law jurisdictions. There is an annual conference at which Roger regularly attends and participates. When the new Society decided to launch an academic journal, the *Criminal Law Forum*, Roger was its founding editor. It was the first journal in English dedicated to issues of international and comparative criminal law.

In the early 1990s, the project of international criminal justice that had lain largely dormant since the 1940s began to revive. Already, Roger had made important

¹⁵ UN Doc. A/RES/40/34.

¹⁶ Roger S. Clark, *The United Nations Crime Prevention and Criminal Justice Program: Formulation of Standards and Efforts at their Implementation*, Philadelphia: University of Pennsylvania Press, 1994.

contributions to the framing of the field through his teaching and scholarly publishing. His 1988 article in the *Nordic Journal of International Law* on 'Offenses of International Concern' was a seminal study of state practice since the Nuremberg trials in the drafting of multilateral treaties on crime, especially in the area of terrorism.¹⁷ In that respect, the book of cases and materials on International Criminal Law, written with Ellen Podgor and the late Edward Wise,¹⁸ is one of the leading teaching books in that area in American law schools.

Roger quickly embraced the new international justice movement, participating in the preparatory meetings of the International Criminal Court not only as an academic observer and NGO activist but also as a representative of Samoa. A small island State that punched well above its weight in the legal and policy debates about the Rome Statute, its delegation was headed by Neroni Slade, a former student of Roger's who went on to become a judge at the International Criminal Court. Roger was seated at the Samoa table in the main chamber of the United Nations Food and Agriculture Organisation, in Rome, on 17 July 1998 (really, it was a bit after midnight on 18 July) when the decisive vote was taken to adopt the Rome Statute.

Roger's fingerprints are visible throughout the *travaux préparatoires* of the Rome Statute. In a report on the December 1997 session of the Preparatory Committee we read: 'Samoa, speaking to a paper circulated in conjunction with Marshall Islands and Solomon Islands, noted that it would be ludicrous if the killing of one person with a poison arrow or expanding bullet could be tried by the court, but not the killing of hundreds of thousands of people with nuclear weapons. Samoa asked whether "The Law is like a spider's web which catches the little flies but lets the big ones break through?"'¹⁹ Or: 'There were very different approaches to the notion of "life imprisonment" as a penalty. Samoa insisted that this should be clarified noting that life imprisonment as imprisonment until the person dies, was debatable since international human rights law may not accept this penalty any more.'²⁰ Samoa made important proposals reflecting a deep-seated commitment to

¹⁷ Roger S. Clark, 'Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years since Nuremberg', (1988) 57 *Nordic Journal of International Law* 49.

¹⁸ Edward M. Wise, Ellen S. Podgor and Roger S. Clark, *International Criminal Law; Cases and Materials* (3rd edn.), Newark/San Francisco/Charlottesville: LexisNexis, 2011.

¹⁹ Initial Summary Reports on December 1-12 Meetings of the United Nations Preparatory Committee on the Establishment of an International Criminal Court, Coalition for an International Criminal Court, 18 December 1997.

²⁰ *Ibid.*

human rights. For example: ‘The Prosecutor may: (d) take necessary measures to ensure the confidentiality of information or the protection of any person, *including victims*.’²¹ At the Rome Conference, Samoa’s head of delegation, Neroni Slade, took on responsibility for coordinating the negotiation of the preamble and the final clauses. Roger helped to keep mixed metaphors out of the preambular imagery, replacing early references to a ‘delicate tapestry that may at any time be rent asunder’²² with the ‘delicate mosaic [that] may be shattered at any time’ in the final text.²³ After the Statute was adopted, Roger brought his huge intellect to bear on some of the very difficult legal problems involved in crafting the Elements of Crimes.²⁴ Then he turned to the crime of aggression, participating in the work of the Special Working Group on the Crime of Aggression and the Kampala Review Conference.²⁵

Taking up his chair as Board of Governors Professor in 1998, Roger reflected on the past 40 years. He dated the beginning from his first course in Roman Law, in 1958, where he was ‘puzzled by the dissonance in the Institutes of Justinian (the basic text for the course) between protestations about justice on the one hand, and the legitimization of the ownership of other humans on the other’. Speaking of ‘the four wonderful decades since’, Roger listed the activities of his career: ‘teaching an assortment of subjects (including criminal law, international law, international criminal law and criminal justice policy, foreign relations law, torts, and insurance law), agitating against assorted colonial situations and other human rights violations, litigating the illegality of nuclear weapons, representing a small state (Samoa) in negotiations to create an international criminal court, writing about structural issues in international organization, and trying to help shape the emerging discipline of “International Criminal Law”, a discipline that includes both public international law

²¹ Proposal by the Delegation of Samoa, Non-Paper [WG 4] No. 18.

²² UN Doc. A/CONF.183/C.1/L.61.

²³ Tuiloma Neroni Slade and Roger S. Clark, ‘Preamble and Final Clauses’, in Lee, *The Making of the Rome Statute*, pp. 421–450.

²⁴ For example: Delegation of Samoa, Some Suggestions on how the Elements of Genocide and Crimes against Humanity might be Re-worked in the Light of Paragraphs 5 and 6 of the Report of the Informal Inter-sessional Meeting in Siracusa, 31 January-6 February 2000, 13 March 2000. See also: Roger S. Clark, ‘The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences’, (2001) 12 *Criminal Law Forum* 291.

²⁵ For example, Elements of the Crime of Aggression, Proposal submitted by Samoa, PCNICC/2002/WGCA/DP.2 had a significant effect in shaping the agenda for the subsequent negotiations.

and comparative law aspects'.²⁶ An initial impression might suggest that his tastes are eclectic but closer examination reveals a profound unity – dare I call it a ‘policy element’ - of these different themes. The list was prepared in 1998 and therefore did not refer to one of Roger’s preoccupations during the decade that was to follow, the development of a legal framework for prosecuting the crime of aggression. I recall chatting with him at Kampala in June 2010 after the amendments to the Rome Statute on the crime of aggression had been adopted. He talked of a mission accomplished, saying it as probably time to move on to other issues. It seemed clear to me that there is still more to come, and to surprise us, from this astonishing scholar.

²⁶ Roger S. Clark, ‘Steven Spielberg’s Amistad and Other Things I Have Thought about in the Past Forty Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery’, (1998-99) 30 *Rutgers Law Journal* 371, at pp. 372-374 (internal references omitted).